Supreme Court of the United States

OCTOBER TERM, 1942

No. 591

THE WEST VIRGINIA STATE BOARD OF EDUCATION, etc., et al.,

Appellants,

v.

WALTER BARNETTE, PAUL STULL, AND LUCY McCLURE,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF OF THE COMMITTEE ON THE BILL OF RIGHTS, OF THE AMERICAN BAR ASSOCIATION, AS FRIENDS ~~ON~~ OF THE COURT.

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State *v.* Lefebvre (N.H.), 20 A. 2d 185 (1941) . . . 21

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Stromberg *v.* California, 283 U.S. 359 (1931) . . . 9

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Balter, H. G. *Freedom of Religion Interpreted in Two Supreme Court Decisions*, 15 California State Bar Journal 161 (1940) 16

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Carpenter, C. E., 14 University of Southern California Law Review 56 (1940) 16

Committee on the Bill of Rights, American Bar Association, Brief in Gobitis Case 1, 2, 4, 7, 8

Cushman, R. E., *Constitutional Law in 1939–40*, 35 American Political Science Review 250 (1941) 14

Fennell, W. G., *The "Reconstructed Court" and Religious Freedom: The Gobitis Case in Retrospect*, 19 New York University Law Quarterly Review 31 (1941) 14, 15, 19

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Galston, C. G., *Conscription of the Mind in Support of the Bill of Rights*, 1 Bill of Rights Review 269 (1941) 17

Gregg, J. R., *Liberty under the Fourteenth Amendment*, 27 Washington University Law Quarterly 497 (1942) 16

Grinnell, F. W., *Children, the Bill of Rights and the American Flag*, 24 Massachusetts Law Quarterly No. 2, p. 1; *id.* No. 3, p. 1; *id.* No. 4 p. 18 (1939) 17

Hutchinson, W. T., editor, *Democracy and Unity* (1941) 13, 14, 19

Million, E. M., *Validity of Compulsory Flag Salutes in Public Schools*, 28 Kentucky Law Journal 306 (1940) 18, 19

Powell, R. R., *Conscience and the Constitution*, in Hutchinson, editor, *Democracy and National Unity* (1941) 13, 14, 19

Skemp, T. H., *Freedom of Religious Worship*, 25 Marquette Law Review 19 (1940) 16

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Tinnelly, J. T., 15 St. John's Law Review 95 (1940) 15, 16

Wilkinson, I. M., *Some Aspects of the Constitutional Guarantees of Civil Liberty*, 11 Fordham Law Review 50 (1942). 16

Wright, H., *Religious Liberty under the Constitution of the United States*, 27 Virginia Law Review (1940) 17

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18 New York University Law Quarterly Review 124 (1940) 16

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14 Temple Law Quarterly 545 (1940) 17

14 University of Cincinnati Law Review 444, 570 (1940) 16

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Supreme Court of the United States

No. 591 **October Term, 1942**

THE WEST VIRGINIA STATE BOARD OF EDUCATION, etc., et al.,

Appellants,

vs.

WALTER BARNETTE, PAUL STULL, AND LUCY McCLURE,

Appellees.

BRIEF OF THE COMMITTEE ON THE BILL OF RIGHTS, OF THE AMERICAN BAR ASSOCIATION, AS FRIENDS OF THE COURT.

Preliminary Statement.

This brief is filed by the Committee on the Bill of Rights, of the American Bar Association, as friends of the Court.[1] This Committee was permitted to intervene in the same capacity in Minersville School District v. Gobitis, 310 U.S. 586 (1940), which involved similar issues of the constitutionality of the compulsory flag salute for children in the public schools. The Committee appears with due authority from the American Bar Association, given in the manner described in our brief in the Gobitis case, to which we beg leave to refer. The consent of counsel for the parties has also been given.

The Gobitis case related to the constitutionality of a regulation of the Minersville School District in Pennsylvania estab-

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[1] The membership of the Committee is as follows: Douglas Arant, Chairman (Alabama); Julius Birge (Indiana); George L. Buist (South Carolina); William D. Campbell (California); Zechariah Chafee, Jr. (Massachusetts); L. Stanley Ford (New Jersey); Abe Fortas (District of Columbia); George I. Haight (Illinois); H. Austin Hauxhurst (Ohio); Monte M. Lemann (Louisiana); Alvin Richards (Oklahoma); Earl F. Morris (Ohio); Burton W. Musser (Utah); Basil O'Connor (New York). George L. Buist does not join in this brief.

lishing the compulsory flag salute. The brief filed by this Committee opposed its constitutionality. The majority of the Court upheld the regulation. The present Chief Justice filed a dissenting opinion, contending that there had been an unconstitutional denial of religious liberty.

The case at bar concerns the constitutionality of a resolution of the West Virginia Board of Education, adopted January 9, 1942, requiring all pupils in the West Virginia public schools to participate regularly in a salute of the flag; and saying a refusal so to salute shall be regarded as an act of insubordination and dealt with accordingly. This means that the child will be excluded from school until he complies, and that his parents are liable to prosecution for his absence.[2]

This suit was brought in the United States District Court to enjoin the enforcement of the resolution by the Board of Education and other defendants. The plaintiffs are three members of an unincorporated religious body called Jehovah's witnesses, with children of compulsory school age, and they sue for the benefit of their own children and for all other Jehovah's witnesses in West Virginia who are similarly situated and their children, said to aggregate many hundreds. They state that all Jehovah's witnesses sincerely believe that the act of participating in the flag-saluting ceremony violates the Biblical Commandment against bowing down to graven images. The facts, as found by the trial court,[3] are that the plaintiffs and their children have conscientious scruples based on religious grounds against saluting the flag; that because of such scruples the children will not comply with the regulation of the Board of Education and will be expelled from school; and that the children will thus be deprived of public school education, and the plaintiffs will either have to pay to have them educated in private schools or be subject to prosecution under the compulsory education law of West Virginia for failure to send them to school.

The plaintiffs claim that they are thus deprived of the "liberty" guaranteed to them by the Fourteenth Amendment,

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[2] W. Va. Code (1931) Chap. 18, Art. 8, as amended by Acts of Legis. (1941) c. 32.

[3] Record, p. 47.

which includes religious liberty guaranteed by the First Amendment. They say the resolution of the Board of Education on January 9, 1942, is also invalid because it has been superseded by a Joint Resolution of Congress of June 22, 1942.[4] Here Congress, after describing the pledge of allegiance to the flag, provided as follows:

> "However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing their headdress. Persons in uniform shall render the military salute."

The defendants moved to dismiss the action for various reasons, including the constitutionality of the West Virginia regulation and the fact the complaint goes counter to the decision of this Court in the Gobitis case.

The district court of three judges, declining to follow the Gobitis decision, held the compulsory flag salute unconstitutional in so far as it applies to children having conscientious scruples, and enjoined its enforcement as to them. 47 F. Supp. 251 (1942). The defendants have appealed.

The Committee's Position.

The Committee has no interest in this litigation save as its outcome will affect the integrity of the basic right to freedom of conscience. Consequently, this brief will not discuss the effect of the Joint Resolution of Congress. This omission does not indicate any belief on our part that this federal statute is immaterial,[5] but simply that our sole concern is with the proper scope of religious liberty.

The constitutional issues in this case are the same as those in the Gobitis case. Therefore, the Committee has filed this brief in the hope that the Court will now, upon a reconsideration of that case, decide to follow the opinion of the present Chief Justice.

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[4] 56 Stat. 380, 36 U.S.C.A., 1942 Cum. Supp. § 172.

[5] In fact, the majority opinion gave as one reason for upholding the Pennsylvania local regulation in 1940: "It is to be noted that the Congress has not entered the field of legislation here under consideration." 310 U.S. at 600, n. 7. Congress has since entered the field by the Joint Resolution of 1942.

ARGUMENT.

The Committee believes that the constitutional prohibition against the deprivation of liberty without due process of law is violated by the enforcement of the compulsory flag salute against children who have sincere religious scruples against participating in this ceremony. The reasons for the invalidity of the regulation are set forth fully in the opinion of the present Chief Justice in the Gobitis case and in the brief which this Committee filed in that case, to which we respectfully beg the Court to refer. The two essential reasons for our position will be briefly stated in this brief.

I.

The flag salute in its application to the plaintiffs and their children should be treated by this Court as a religious ceremony.

Most of us may regard it as merely a beneficial training in patriotism, as a "gesture of respect for the symbol of our national life"; but it does have religious significance *for them*. They feel it to be an idolatrous worship abhorrent to their deep spiritual emotions, a deadly sin to be shunned under peril of damnation. Therefore *as to them* it must be judged as a restraint on religious liberty which can only be justified, if at all, by very strong contravening public good. This problem of justification will be discussed under our second argument, but our immediate point is that such justification is necessary. The court may have to prevent a man from following the pathway revealed to him by the inner light, but it must not tell him that the inner light does not shine. The right of private judgment as to the religious quality of one's own conduct should be held inviolate. For a court to deny that right would strike at the heart of religious freedom. No American judge should presume to tell any person that he is wrong in his opinion as to how he may best serve the God in whom he believes.

This conclusion results naturally from the traditional American attitude toward small religious groups, an attitude which

forms an integral part of our way of life. These small groups have been accorded all rights and privileges granted to the larger and more ancient religious bodies.

It is of course true, even under Bill of Rights, that particular religious views from time have had to yield to the paramount demands of public health, safety or morals. But that, as we have just said, is an entirely distinct problem. Courts are competent to judge when the public welfare is in fact jeopardized by a belief, but they are not competent to judge that the belief is not religious. Here analysis and logic must yield to simple faith. It should, we submit, be deemed inadmissible for a court to brush aside a *sincere* religious objection because the same scruple is not held by most of the people, or because in the court's own view the scruple is theologically unsound. Such an official determination would presuppose a unity between church and state which is foreign to our most basic institutions.

The issue as to whether the individual should be the sole judge of his own religious belief is a very old one. For centuries, various sects have honestly ascribed religious significance to acts and ceremonies that, to the vast majority, held no religious meaning whatever. The Jews in Pilate's time considered the carrying of busts of the Emperor Tiberius through the streets of Jerusalem to be a violation of the Biblical Commandment involved in the present case. The early Christian soldiers thought the wearing of laurel wreaths to be incompatible with Christianity. The Quakers in seventeenth-century England declined to uncover their heads in court. The record of history shows that the existence and seriousness of religious beliefs are not to be measured by the current opinion of the time. The truth is that the existence of religious scruples lies within the mind and heart of the individual man or woman, and nowhere else. Here a man is the only judge of himself. No outsider, not even legislature or court, can decide what pathway will lead his spirit to salvation or what road will take him to a moral or a physical hell. Therefore the compulsion of a child to participate in a ceremony which he considers idolatrous worship cannot be brushed aside as raising no issue of religious liberty. For that child religious liberty is just as much at stake in his expulsion from the only

school his parents can afford as it was at stake for the Scotch Covenanters who were harried for refusing to listen to the Anglican prayer-book or for the English Catholics when they were heavily fined for absence from the parish church.

II.

This impairment of religious liberty has no reasonable tendency to promote any public interest.

Since the compulsory flag salute thus impairs the religious liberty of these children to worship only in their own way and the liberty of these parents to bring up their children in their own faith, the regulation must be invalid *as to them* unless it be essential for the attainment of some public purpose which is so important as to outweigh even the right to religious freedom. We do not contend that religious liberty is unlimited, but only that limits must be justified by a plain and strong public need. No clear showing has been made here, we submit, of any public good which is served by a ceremony regarded by the unwilling participants as idolatrous.

In the first place, this legislation is of a sort new to America. It is an attempt to *compel* a particular expression as distinguished from *restraints* on certain kinds of expression. Judges have recognized the validity of prohibitions against various practices even though they were actuated by religious motives, such as bigamy and polygamy, human sacrifices, suttee, thuggery and the religious belief in assassination, promiscuous sexual intercourse, the possession of sacramental wine in excess of a statutory limit, burial customs dangerous to health, and spiritualistic fortune-telling.* There the individual was forbidden to do something which he believed holy. It is a much more serious interference with his religious liberty to order him to do something which he believes to be unholy like participation in a religious ceremony violative of his beliefs. There is no precedent prior to the flag salute legislation for requiring a person to perform a particular ceremony contrary to his religious beliefs. The present regulation is novel also in that the legislative power is not here exercised, as in the cases just listed, in furtherance of the safety, morals, physical health or economic welfare of the people. In the few situations where religion was held not to excuse the

* The authorities for these and other prohibitions are given in the Committee's *Gobitis* brief, p. 28.

failure to perform affirmative acts, those acts were important in themselves, not a ceremony, and they bore a close relation to the public health and safety like furnishing medical aid to sick children or military training.[7] But the object of the present law is not to obtain definitely useful services, but merely to produce a state of mind. Religious liberty is now to be limited for the novel purpose of presumably promoting loyalty and morale and national unity.

The vital question before the Court is whether there is any clear relation between these purposes and this ceremony when performed by children who believe it a deadly sin. The resplendence of national unity and loyalty should not blind the Court to the need for clear proof that these purposes will be furthered by the *coercion of these children*. The advocates of the union of Church and State have constantly argued that it would promote national unity for all citizens to join in a common religious ceremony. True enough if there were no dissenters to whom the ceremony is abhorrent. Since there are dissenters, we Americans learned long ago that nothing is gained by forcing them to join in acts which they think impious. Therefore, an extension of American legislative power in this direction should be viewed with suspicion, and, *in the absence of a showing of clear necessity*, should be condemned as a deprivation of individual liberty without due process of law.

In any search for the required proof, it is important to recognize that the compulsory flag salute by children who object to it on religious grounds is an entirely different thing from such a salute by children who accept it as a mere gesture of proper respect to the nation we love. Any arguments that the salute is useful training to children in general have no bearing on the problem of its value to the few children who abhor it as image-worship. No evidence has been offered to prove that the salute has any educational value to such objectors, and the probabilities are so strongly to the contrary that the gap cannot be filled by judicial notice. The contention that the morale and loyalty of the children participating willingly would suffer if

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[7] See the authorities cited on page 29 of our *Gobitis* brief.

the objectors were excused from the ceremony also rests on no evidence in the case or common knowledge to serve as the basis of judicial notice; and it is squarely rebutted by the present Chief Justice:[8]

> ". . . I cannot say that the inconveniences which may attend some sensible adjustment of school discipline in order that the religious convictions of these children may be spared, presents a problem so momentous or pressing as to outweigh the freedom from compulsory violation of religious faith which has been thought worthy of constitutional protection."

The vital question whether there is any reasonable connection between the attainment of national unity and the compulsory flag salute *by these children* against their consciences should, we submit, be answered by this Court. And it is for this Court to decide whether this relationship, if it exist, is sufficiently close to outweigh the value of religious liberty. Judgments of this nature cannot be entrusted to legislatures or school boards in cases involving civil liberties under the Bill of Rights. Such has not been the practice of this Court. In *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496 (1939), the Court did not accept the judgment of the government of Jersey City that there was a necessary relationship between closing the streets and parks to speakers and the promotion of public safety. Here there was much more of a possible relationship shown by experience than that between a hateful ceremony and national unity, but the Court examined the connection itself and held it too thin to offset the right of free assembly. In *Stromberg* v. *California*, 283 U.S. 359 (1931), the connection between punishing salutes of the red flag and public safety was much more obvious than that between unwillingly saluting the United States flag and national unity in the case at bar. Yet the Court did not accept the judgment of the California legislature as to the sufficiency of the connection. Indeed, the Court held that the relationship was too remote to constitute the clear and present danger of overt acts which is essential for the denial of freedom

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[8] Minersville School District v. Gobitis, 310 U.S. at 607.

of speech. The same severe scrutiny of the alleged relationship between the compulsory flag salute and national unity seems indispensable, in the case at bar, unless this Court be ready to hold that religious liberty plays a less important part in our national life than liberty of speech.

This is not a contest between two powerful economic groups, where the side which suffers from a statute has a fair chance to obtain a revision of the law from another legislature after a fresh election through the use of normal democratic processes. In such contests this Court hesitates to substitute its judgment for that of the legislature. Here, however, the contest is hopelessly unequal as the Chief Justice points out:[9]

> "Here we have such a small minority entertaining in good faith a religious belief, which is such a departure from the usual course of human conduct, that most persons are disposed to regard it with little toleration or concern."

Such a small religious group is very unlikely to attain sufficient voting power to overthrow compulsory flag salute laws. It must obtain protection from the Bill of Rights, or nowhere. Surely the First Amendment was not written to put the religious liberty of small groups at the mercy of legislative majorities and school boards.

> "The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist."[10]

In *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496 (1939) and in *Schneider* v. *New Jersey*, 308 U.S. 147 (1939), this Court held that, when the fundamental individual liberties are at stake, the government is *restricted in its choice of methods* and may even be required to adopt some relatively inefficient and inconvenient means when it wants to achieve a proper purpose.

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[9] Minersville School District *v.* Gobitis, 310 U.S. at 606.

[10] Stone, J., in Minersville School District *v.* Gobitis, 310 U.S. at 606–7.

If this doctrine is applicable to freedom of speech, is it not applicable also to the equally basic guarantee of liberty of conscience?

The Committee submits that the present case falls squarely within the rule of the *Hague* and *Schneider* decisions, and that the petitioner school authorities are required by the Constitution to adopt some alternative method or methods of fostering patriotism in school children instead of insisting upon the imposition of the salute upon children who object to it on religious grounds. Various alternative methods of this end are available and will readily occur to the Court.

Therefore, we contend that no public interest has been established sufficient to justify the enforcement of the compulsory flag salute against these children. The only public interest alleged is the promotion of loyalty, morale, and national unity. Even if such vague concepts can ever validate a law which interferes with religious liberty, they should not do so unless such interference is shown to be clearly needed to attain these purposes. Since the constitutional protection of religious freedom requires the Court to pass upon the alleged relationship between the law and the public interest instead of accepting the judgment of the school authorities upon a constitutional issue, then we believe that the Court will find no proof of any sort that the enforced participation of these children in a ceremony which they regard as sinful idolatry will promote either their loyalty or the loyalty of their schoolmates.

III.

The subsequent effect of the Gobitis Case shows the soundness of the opinion of the present Chief Justice that the compulsory flag salute is unconstitutional as to these children.

Instead of further arguments, we shall devote the rest of this brief to material of an entirely different kind which has become available since that case was decided. This material will show the effect of the *Gobitis* case in three respects:

1. The opinion of the present Chief Justice has been overwhelmingly accepted by subsequent legal discussion as the sound presentation of the proper scope of religious liberty.

2. In so far as school authorities have been affected by the actual decision of the Court, the result has been harmful to religious liberty.

3. State courts, instead of being influenced by the actual decision, have tended to follow the reasoning of the present Chief Justice.

We venture to hope that this material will assist the Court in reaching the conclusion that the opinion of the present Chief Justice should have been adopted as the decision of the Court in the *Gobitis* case, and that the Court will now adopt that opinion as the basis of constitutional protection for religious liberty.

1. *Legal discussion of the Gobitis decision overwhelmingly supports the opinion of the present Chief Justice.*

Legal discussion of a contemporary constitutional decision, so far as it gets into print, must be mainly obtained from legal periodicals, the reports of bar associations, and similar sources. Treatises are unlikely to be sufficiently up-to-date. A careful examination of the material just described shows that the Gobitis case has been discussed in 22 different legal publications (some-

times more than once). Out of these 22, 18 approve the opinion of the present Chief Justice; only 2 agree with the decision of the Court; and 2 simply describe the case without taking sides. Of course law is not made by counting the noses of law reviews and a moderate majority would have little importance for the present case. But when 18 out of the 20 publications taking sides on the issue regard the opinion of the present Chief Justice as the sound exposition of religious liberty, this fact shows a definite trend of professional opinion which ought not to be ignored. To find a precedent for such overwhelmingly adverse professional criticism of a decision by the Court, we should have to go back to *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923), which held that Congress could not constitutionally establish a minimum wage for women and children.

It is true that, if we leave aside the articles by law professors and practitioners, the comments cited were written by young men and women studying in law schools; but they are none the less important for being the thoughts of youth. The writers are among the ablest students in their respective schools. They are the bar and bench of the near future, so that their views forecast professional opinion. All of them wrote in 1940 and 1941 with the knowledge that they might soon be required to risk their lives in the defense of the nation. Therefore, the virtually unanimous belief of these young men and women that religious liberty must not be sacrificed for a supposed effort to promote patriotism is a strong indication that the opinion of the present Chief Justice truly expresses the meaning of the Bill of Rights.

Space permits only the quotation of a few brief extracts from this contemporary legal discussion of the *Gobitis* case. There is much of value in the other citations which are listed below.

Professor Thomas Reed Powell of Harvard Law School has written a careful examination of the decision in his essay, "Conscience and the Constitution," in a book edited by W. T. Hutchinson, *Democracy and Unity* (University of Chicago Press, 1941), pp. 18–31. He says (pp. 29, 30):

> "This is not to suggest that conscientious scruples can stand against all compulsion to do positive acts. Quite the contrary. The question is one of degree. I should think that

it requires more justification to compel a man or child to commit what he regards as sin than to restrict him in the areas in which he can practice what he regards as a command of the Lord. The public need should be pretty clear if it is to override conscientious objections against performing positive acts. The public need for armed defense may well be regarded as the most pressing public need of all. The public need for coerced and insincere saluting of the flag by little children seems to me to be trivial, and the effort to coerce it seems to me likely to be self-defeating. . . . .

"The dissent exposes the deficiencies in this particular compulsion of the young and points to alternative and better ways of attaining the very ends so strongly emphasized in the opinion of the majority. Clearly a contrary decision would have been no threat of the danger of making the state too weak to maintain its own existence."

Professor Robert E. Cushman of Cornell University, "Constitutional Law in 1939-40," 35 Am. Pol. Sci. Rev. 250, 271 (1941).

"[The majority opinion] falls far short of proving that national unity or any other desirable result will come from compelling school children publicly to affirm unfelt loyalties. All of the eloquence by which the majority extol the ceremony of flag saluting as a free expression of patriotism turns sour when used to describe the brutal compulsion which requires a sensitive and conscientious child to stultify himself in public."

W. G. Fennell, "The 'Reconstructed Court' and Religious Freedom: The Gobitis Case in Retrospect," 19 N.Y. Univ. L.Q. Rev. 31, 47 (1941).

"To exercise care in seeing that no legislation is permitted to stand which threatens the processes whereby political changes may ordinarily be effected is necessary, but alone it is not enough. . . . It is in such situations where prejudice against minorities curtails the operation of ordinary political processes that the Supreme Court has a duty to scrutinize even more carefully legislation which violates the rights of religious or racial minorities. . . .

"If the . . . [Court] continues to adhere in cases involving religious liberty to the doctrine of the majority in the *Gobitis* case, the scope of the state police power will be immeasurably enhanced and religious liberty will be at the mercy of shifting political majorities. It is to the lasting credit of the new Chief Justice that he comprehended that the Constitution expresses more than the conviction that democratic processes must be preserved at all costs; it is also an expression of faith and a command *which government itself must obey* that freedom of mind and spirit must be preserved."

Father Joseph T. Tinnelly, C.M., in 15 St. John's L. Rev. 95, 97 (1940) (it will be remembered that Jehovah's witnesses are bitter opponents of the Catholic Church).

"It is conceded that there may be times when the government may lawfully demand a public and external manifestation of the loyalty of its citizens. But it has no right, in the face of religious protests, to demand that that manifestation assume a particular, arbitrary form, when some other and religiously unobjectionable form would serve its purpose equally well. If national unity may be attained and freedom of conscience left uninfringed by the use of means other than the flag salute, those means should be used. [A footnote refers to the fact that religious objections to the customary swearing of witnesses are respected by the provision of the alternative method of affirmation.] . . . Patriotism and loyalty were not born in this country with the enactment of the first flag salute statute and the educational system which cannot foster them without infringing liberty of conscience is on the verge of pedagogical bankruptcy.

"To be sure, national unity, freedom and security are fostered by external marks of respect for the flag which symbolizes them. But they are, nevertheless, independent of these acts. To forget this fact is to risk falling into a dangerous formalism; it is to confuse the symbol with the thing symbolized; the shadow with the reality; flag waving with patriotism. The patriotism of the Gobitis children is not on trial. The lower courts found that there was no question of their substantial loyalty. And when we have the substance of loyalty we can well afford to overlook the children's refusal to externalize it by some accidental and

arbitrary form to which they objected on religious grounds. The greater danger lies in false professions of loyalty; the undetected enemy saluting the flag he plans to destroy. There seems to be no valid reason, then, for the denial to the Gobitis children of their freedom of conscience and the compulsory flag salute would appear to be an unjustified and unconstitutional use of the police power."

The opinion of the present Chief Justice is also approved by the following:

1 Bill of Rights Rev. 267 (1941).

H. G. Balter, "Freedom of Religion interpreted . . ." 15 Cal. St. Bar J. 161 (1940).

14 Univ. Cincinnati L. Rev. 444; *id.* 570, 571 (1940).

26 Cornell L. Q. 127 (1940).

4 Univ. Detroit L. J. 38 (1940).

Dean Ignatius M. Wilkinson of Fordham Law School, "Some Aspects of the Constitutional Guarantees of Civil Liberty," 11 Fordham L. Rev. 50 (1942).

29 Georgetown L. J. 112 (1940).

9 Internat. Juridical Assn. Bull. 1 (1940).

T. H. Skemp, "Freedom of Religious Worship," 25 Marquette L. Rev. 19 (1940).

39 Michigan L. Rev. 149 (1940).

6 Missouri L. Rev. 106 (1941).

18 N. Y. Univ. L. Q. Rev. 124 (1940).

Professor Charles E. Carpenter, Southern California Law School, in 14 Univ. So. Cal. L. Rev. 56 (1940).

14 Univ. So. Cal. L. Rev. 73 (1940).

15 Wash. L. Rev. 265 (1940).

J. R. Green, "Liberty under the Fourteenth Amendment," 27 Wash. Univ. L. Q. 497 (1942).

Only two law reviews have been found since the Gobitis case which favor constitutionality:

9 Jo. Bar Assn. of Kansas 276 (1941) [but compare the later Kansas decision stated *infra* p. 23].

14 Temple L. Q. 545 (1940).

The remaining discussions of the Gobitis case in legal periodicals take no position on either side:

C. G. Galston, "Conscription of the Mind in Support of the Bill of Rights," 1 Bill of Rights Rev. 269 (1941).

3 Ga. Bar J. No. 2, p. 66 (Nov. 1940). The reversed decision by the Circuit Court of Appeals was approved in 2 *id.* No. 4, p. 74 (May, 1940).

H. Wright, "Religious Liberty under the Constitution of the United States," 27 Va. L. Rev. 75 (1940).

To complete the picture of law review opinion, we may mention that several reviews which did not discuss the decision of the Court in the Gobitis case had already opposed the validity of the compulsory flag-salute in reviewing the case below or state cases.

20 Boston Univ. L. Rev. 356 (1940).

9 Brooklyn L. Rev. 205 (1940).

51 Harv. L. Rev. 1418 (1938).

23 Ia. L. Rev. 424 (1938).

F. W. Grinnell, "Children, the Bill of Rights and the American Flag," 24 Mass. L.Q.No.2, p. 1 (April-June 1939), *id.* No. 3, p. 1 (July-Sept. 1939), *id.* No. 4, p. 18 (Oct.-Dec. 1939).

23 Minn. L. Rev. 247 (1939).

74 New York L. Rev. 4 (1940).

18 Ore. L. Rev. 122 (1939).

86 Univ. Pa. L. Rev. 431 (1938).

2 Univ. Pittsburgh L. Rev. 206 (1936).

12 Rocky Mt. L. Rev. 202 (1940).

By contrast only two law reviews upheld the compulsory flag-salute in these earlier discussions:

8 Geo. Wash. L. Rev. 1094 (1940).

Professor E. M. Million of University of Idaho Law School, "Validity of Compulsory Flag Salutes in Public Schools," 28 Ky. L.J. 306 (1940) (questioning wisdom of compulsion).

The following law reviews were non-committal:

6 Kans. City L. Rev. 217 (1938).

14 Notre Dame Lawy. 115 (1938).

2 Law Journal of the Student Bar Assn., Ohio State Univ., 151 (1936) (questioning wisdom of regulation).

2. *The continued enforcement of the flag salute against children with religious scruples, which the* Gobitis *decision permitted, has been harmful to religious liberty.*

The decision in the *Gobitis* case merely held that the children could be expelled from a public school for refusing to salute the flag. It did not say what was to happen to them afterwards. But the decision left the children and their parents in a dilemma. Unless they were wealthy enough to send them to a private school, what was to be done? If the children went to another public school, they would merely suffer another expulsion. If they stayed at home, the parents would be prosecuted and imprisoned. Furthermore, statutes could easily be construed to make the expelled children juvenile offenders for their disobedience of a valid school regulation. The line is very thin between wrongdoing which deserves expulsion from a public school and wrongdoing which deserves commitment to a reform school. The parents too became liable to prosecution in some states for not returning their children to the very public school from which they had been expelled. Attempts have even been made to remove children from the custody of their parents on the ground of unfitness to bring them up.[11]

[11] See Fennell, *op. cit. supra*, 19 N.Y.U.L.Q. Rev. at 42; Plaintiff's Bill of Complaint, Record pp. 8-10; "The *Gobitis* Case in Retrospect," 1 Bill of Rts. Rev. 267

Some of these harsh proceedings were checked by court decisions, as we shall show, often because of some technical loophole in the school-laws; but for every parent or child thus judicially rescued there were possibly many more who went to jail or reform school because the local statute offered no hopeful loophole or because the family was too poor to resort to the courts.

Although the decision of this Court did not go so far as to send children to reform school or their fathers to jail, nevertheless the *Gobitis* decision by sanctioning expulsion made it easy for school boards to take the first step in a process which would naturally end in imprisoning somebody unless the board was willing to let the law become a dead-letter. And nothing in the decision provides a safeguard against the incarceration of father and child. Professor Thomas Reed Powell describes the whole situation:[12]

> "For the inanity of thinking that the ancient Hebrews gave or had authority to give any command not to salute the American flag, I have no real respect. Yet for little children I have great sympathy, however misguided the teachings and compulsions of their simple-minded, unintelligent parents. For the folly of excluding them from the benefits of public education I have nothing but contempt, on the very basis of the hopes of making them loyal Americans and of promoting national unity and patriotism. To commit them to institutions for the wayward and make them scholars in the schools of vice is to be guilty of an outrage that would make my blood boil. The decision under review does not sanction that . . . I cannot believe that the Supreme Court will permit such degradation and disgrace, although it left the Gobitis children to such poor and meager instruction as impecunicus parents can provide, and it refrained from caveats that would distinguish other penalties from that of expulsion from public schools."

(1941). The actual operation of the compulsory flag salute with its attendant criminal proceedings is fully reviewed by Professor E. M. Million of Idaho University College of Law, 28 Ky. L.J. 306 (1940), written before the Gobitis case.

[12] *Op. cit. supra* p. 13 of this brief, at p. 28.

The truth is that this chaotic situation is bound to continue so long as the *Gobitis* decision stands. The only lawful ways out of the dilemma created by the compulsory flag salute for a family of Jehovah's witnesses are (a) compliance with the salute regulation, which is for them a deadly sin; and (b) a private school for which these persons, largely working people, cannot pay. If the sect provides its own school, this means tearing the children from home for an education inferior to that in the public schools. All other ways out are illegal and lead straight to jail if the compulsory salute law is worth enforcing.

Since no one benefits from a continuance of this chaos, there seems to be little public good to justify the prolongation of interference with religious liberty.

3. *State courts, instead of being influenced by the actual decision in the* Gobitis *case, have tended to follow the reasoning of the present Chief Justice.*

The three years which have elapsed since the *Gobitis* case have shown an extraordinary preponderance of professional opinion, set forth under heading 1 of this brief, that the opinion of the present Chief Justice was sound; and there has also been a striking desire on the part of courts to follow that opinion. In addition to the decision by the three-judge district court in the case at bar, this tendency has been exhibited in state courts. Before the *Gobitis* case a large number of state courts of last resort had upheld the constitutionality of the compulsory flag salute, whereas since the publication of the opinion of the present Chief Justice not a single state decision in a court of last resort has been found which sustains the expulsion of a child from public schools for refusing on religious grounds to salute the flag. States which previously favored constitutionality have continued to do so, but no new state has been added to the list. The trend has been in the opposite direction. While school authorities have been active in enforcing the compulsory flag salute by expulsions and prosecutions of parents and children, yet judges, whenever they had the opportunity to review a case, have taken a much more lenient attitude toward the dissenting

children and their parents. The state court cases fall into two groups. The first group has kept the enforcement of the compulsory flag salute within narrow limits, and the second group has prevented its enforcement altogether.

In the first group of state cases children have been expelled from school for refusing to salute the flag, but the validity of this expulsion had either been settled by a previous decision or was not before the court. Instead, the court had to consider the question whether the school authorities could follow up the expulsion by sending the child to a reform school as a delinquent juvenile or by prosecuting the father for failing to send his child to public school. The following cases quashed such prosecutions:

Commonwealth v. *Johnson*, 309 Mass. 476, 35 N.E. 2d 801 (1941).

Although the Massachusetts statutes had previously been construed to permit the expulsion of the child from school, such exclusion was held not to imply such wrongdoing that the child could be committed to a county training school as a habitual offender. This severe penalty should not be imposed in the absence of express statutory provisions therefor. The constitutional question was expressly left aside.

State v. *Lefebvre* (N.H.), 20 A. 2d 185 (1941).

Children expelled from school for refusal to salute the flag had been adjudged delinquent and been committed to the Industrial School for their minorities. A powerful opinion by Judge Page refused to let family life be broken up and discharged the children, expressly relying on the opinion of the present Chief Justice.

Matter of Jones, 175 Misc. 451, 24 N.Y.S. 2d 10 (1940), same point.

Re Reed, 262 App. Div. 814, 30 N.Y.S. 2d 702 (1941), same point.

Commonwealth v. *Nemchick*, Court of Quarter Sessions, Luzerne County, Pa. (Nov. 20, 1942), unreported.

In Pennsylvania, the very state where the *Gobitis* case arose, the conviction of a mother for failure to have her expelled children attend school was reversed. The decision rested partly on the fact that the school authorities did not

give the required written notice three days before proceeding against her; but the court also held that the entire regulation prescribing the compulsory flag salute was invalidated by the Act of Congress of June 22, 1942, quoted in the Introduction in this brief.

Bolling v. *Superior Court for Clallam County*, Supreme Court of Washington (January 29, 1943), not yet reported.

Children of Jehovah's witnesses were expelled from school for refusal to salute the flag. The parents had no other means of educating them. The children were brought before the juvenile court as delinquent and declared to be wards of the court. They were taken away from their parents on a finding that the parents had neglected and refused to provide and permit proper training and education, and were placed in charge of their older sister. The Supreme Court of Washington issued a writ of prohibition to prevent the enforcement of this order, holding it to violate the Fourteenth Amendment, the Joint Resolution of Congress quoted *supra* page 3, and Amendment 4 to the Washington Constitution. The court, through Judge Beals, relied on the opinion of the former Chief Justice, which was quoted at length, and expressed entire agreement with the decision of the District Court in the case at bar. Although the validity of the expulsions was not before the court, the reasoning of the opinion is completely opposed to any enforcement of the compulsory flag salute against these children.

The material portion of the Constitution of the State of Washington, Amendment 4, reads: "Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. . . ."

The preceding cases leave the children and their parents safely at home, although the children remain deprived of any education.[12a] The cases now to be considered reached the still

[12a] But see State v. Davis (Ariz.) 120 P 2d 808 (1942) as to criminality of parents for instructing their children.

more desirable result of restoring the children to their normal status in a public school.

State v. *Smith*, 155 Kans. 588, 127 P. 2d 518 (1942).

In reversing a criminal prosecution against the parents of expelled children, the Supreme Court of Kansas expressly invalidated the earliest of all the compulsory flag salute statutes, holding that it could not be constitutionally construed to support the expulsion of children from school if they refused on religious grounds to participate in the ceremony. Religious liberty was held to receive a wider protection from the Kansas Bill of Rights than under the national Bill of Rights as construed in the Gobitis case. The Kansas Bill of Rights, § 7, reads:

"The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control or interference with the rights of conscience be permitted, nor any preference given by law to any religious establishment or mode of worship. No religious test or property qualification shall be required for any office of public trust, nor for any vote at any election, nor shall any person be incompetent to testify on account of religious belief."

In Minnesota a District Court judge held that the expulsion of children from school for refusing on religious grounds to salute the flag violated the First and Fourteenth Amendments and also paragraph 16 of the Minnesota Bill of Rights.

Braun v. *Skustad*, District Court for the Eleventh Judicial District, St. Louis County, Minnesota (December 12, 1942).

We respectfully submit that liberty of religion under the First and Fourteenth Amendments should have the same breadth as under the more detailed constitutional provisions of Kansas, Minnesota, and Washington.

Thus the three years since the Gobitis case have supplied much evidence as to the actual operation of the compulsory flag

salute. The nature of most of the recent cases has obliged state judges to focus their attention upon what the enforcement of the law does to these children and their parents, rather than upon what it is supposed to do to the nation. The state courts have had before them children, otherwise loyal and well behaved, who had been rendered stubborn and rebellious at a critical time in their lives when steady growth and freedom from unnecessary emotional strains is essential. Their education has been demoralized by the expulsions which this Court sanctioned; some get piecemeal instructions from their parents; some are sent away to a distant sectarian school; others are torn from their homes and committed for the rest of their adolescence to institutions for juvenile delinquents. The state judges have had to deal with fathers and even mothers who have also been torn from their homes and sent to jail for no other crime than teaching their simple faith to their own offspring. These ugly facts have made glowing abstractions about loyalty and national unity seem increasingly remote from the enforced salute. When men see how enforcement of the flag salute against a conscientious child disunites his school and his family, they doubt the reasonableness of its power to unite the nation.

CONCLUSION

The regulation forcing the children of these plaintiffs to engage in a ceremony which they believe to be sinful is an interference with religious liberty. We recognize that some interferences with religious liberty are constitutional, for it is not unlimited. The value of religious liberty must be weighed in the scales against the value of the conduct which the law requires. It is a problem of balancing. But this Court in view of the constitutional mandate must do this balancing itself. Religious liberty has been the cherished possession of small minorities, and would lose all its safeguards were it entrusted to the judgment of majorities in legislatures or administrative bodies.[13]

Everybody recognizes that national unity is a great ideal, but the whole question is whether national unity has anything to do with the case. What is to be weighed in the scales is the value of the conduct which the law requires. The law does not require national unity and it could not. National unity is a creation of the spirit, and the wind of the spirit "bloweth where it listeth." What the law does require is the salute of the flag by children who regard such saluting as a damnable sin. What must be weighed is the value of that ceremony as performed *by these children*—not by some other children who welcome it but by these children who detest it as forbidden by the Word of God. On that alone should the attention of the Court be concentrated. Everything then turns on the question whether there is any *reasonable* connection between the enforced participation of the children in a sinful ceremony and the promotion of national unity. The more one looks squarely at facts and probabilities, the better he can see that there never was any *reasonable* connection. The means are wholly unfit to attain the end which we all desire. As the present Chief Justice observes:[14]

> "And while such expressions of loyalty, when voluntarily given, may promote national unity, it is quite another matter to say that their compulsory expression by children

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[13] See Stone, J., Minersville School District *v.* Gobitis, 310 U.S. at 604-605.

[14] Minersville School District *v.* Gobitis, 310 U.S. at 605.

in violation of their own and their parents' religious convictions can be regarded as playing so important a part in our national unity as to leave school boards free to exact it despite the constitutional guarantee of freedom of religion."

The nation which survived Valley Forge and the dark days of the Civil War without compulsory flag salutes will not go to rack and ruin because a few children fail to participate in this novel ceremony on account of their religious beliefs. We respectfully urge the Court to adopt the view of the present Chief Justice that their absence will not endanger the safety of the nation. Robert Frost, the poet, put this whole case in a nutshell when he recently said in reply to the observation that Mr. Justice Stone's opinion showed no such fears:

"Yes, he knew the flag was all right, any way."

Accordingly, the Committee submits that the judgment of the lower court should be affirmed.

Respectfully submitted.

THE COMMITTEE ON THE BILL OF RIGHTS, OF THE AMERICAN BAR ASSOCIATION

DOUGLAS ARANT, *Chairman*
(of the Alabama Bar)

JULIUS BIRGE
(of the Indiana Bar)

WILLIAM D. CAMPBELL
(of the California Bar)

ZECHARIAH CHAFEE, JR.
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L. STANLEY FORD
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MONTE M. LEMANN
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ALVIN RICHARDS
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EARL F. MORRIS
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BURTON W. MUSSER
(of the Utah Bar)

BASIL O'CONNOR
(of the New York Bar)

Oct. 7, 1943 From 4 parts ; dissent.

SUPREME COURT OF THE UNITED STATES.

No. 591.—October Term, 1942.

The West Virginia State Board of Education, etc., et al., Appellants, *vs.* Walter Barnette, Paul Stull and Lucy McClure.	On Appeal from the District Court of the United States for the Southern District of West Virginia.

[June 14, 1943.]

Mr. Justice Jackson delivered the opinion of the Court.

Following the decision by this Court on June 3, 1940, in *Minersville School District* v. *Gobitis*, 310 U. S. 586, the West Virginia legislature amended its statutes to require all schools therein to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the State "for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government." Appellant Board of Education was directed, with advice of the State Superintendent of Schools, to "prescribe the courses of study covering these subjects" for public schools. The Act made it the duty of private, parochial and denominational schools to prescribe courses of study "similar to those required for the public schools."[1]

The Board of Education on January 9, 1942, adopted a resolution containing recitals taken largely from the Court's *Gobitis* opinion and ordering that the salute to the flag become "a regular part of the program of activities in the public schools," that all teachers and pupils "shall be required to participate in the

[1] § 1734, West Virginia Code (1941 Supp.):

"In all public, private, parochial and denominational schools located within this state there shall be given regular courses of instruction in history of the United States, in civics, and in the constitutions of the United States and of the State of West Virginia, for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government of the United

salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an Act of insubordination, and shall be dealt with accordingly."[2]

The resolution originally required the "commonly accepted salute to the Flag" which it defined. Objections to the salute as "being too much like Hitler's" were raised by the Parent and Teachers Association, the Boy and Girl Scouts, the Red Cross, and the Federa-

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States and of the state of West Virginia. The state board of education shall, with the advice of the state superintendent of schools, prescribe the courses of study covering these subjects for the public elementary and grammar schools, public high schools and state normal schools. It shall be the duty of the officials or boards having authority over the respective private, parochial and denominational schools to prescribe courses of study for the schools under their control and supervision similar to those required for the public schools."

[2] The text is as follows:

"WHEREAS, The West Virginia State Board of Education holds in highest regard those rights and privileges guaranteed by the Bill of Rights in the Constitution of the United States of America and in the Constitution of West Virginia, specifically, the first amendment to the Constitution of the United States as restated in the fourteenth amendment to the same document and in the guarantee of religious freedom in Article III of the Constitution of this State, and

"WHEREAS, The West Virginia State Board of Education honors the broad principle that one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law; that the propagation of belief is protected whether in church or chapel, mosque or synagogue, tabernacle or meeting house; that the Constitutions of the United States and of the State of West Virginia assure generous immunity to the individual from imposition of penalty for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in the government, but

"WHEREAS, The West Virginia State Board of Education recognizes that the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellowman; that conscientious scruples have not in the course of the long struggle for religious toleration relieved the individual from obedience to the general law not aimed at the promotion or restriction of the religious beliefs; that the mere possession of convictions which contradict the relevant concerns of political society does not relieve the citizen from the discharge of political responsibility, and

"WHEREAS, The West Virginia State Board of Education holds that national unity is the basis of national security; that the flag of our Nation is the symbol of our National Unity transcending all internal differences, however large within the framework of the Constitution; that the Flag is the symbol of the Nation's power; that emblem of freedom in its truest, best sense; that it signifies government resting on the consent of the governed, liberty regulated by law, protection of the weak against the strong, security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression, and

"WHEREAS, The West Virginia State Board of Education maintains that the public schools, established by the legislature of the State of West Virginia under the authority of the Constitution of the State of West Virginia and supported by taxes imposed by legally constituted measures, are dealing with the formative period in the development in citizenship that the

tion of Women's Clubs.[3] Some modification appears to have been made in deference to these objections, but no concession was made to Jehovah's Witnesses.[4] What is now required is the "stiff-arm" salute, the saluter to keep the right hand raised with palm turned up while the following is repeated: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all."

Failure to conform is "insubordination" dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile the expelled child is "unlawfully absent"[5] and may be proceeded against as a delinquent.[6] His parents or guardians are

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Flag is an allowable portion of the program of schools thus publicly supported.

"Therefore, be it RESOLVED, That the West Virginia Board of Education does hereby recognize and order that the commonly accepted salute to the Flag of the United States—the right hand is placed upon the breast and the following pledge repeated in unison: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all'—now becomes a regular part of the program of activities in the public schools, supported in whole or in part by public funds, and that all teachers as defined by law in West Virginia and pupils in such schools shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly."

[3] The National Headquarters of the United States Flag Association takes the position that the extension of the right arm in this salute to the flag is not the Nazi-Facist salute, "although quite similar to it. In the Pledge to the Flag the right arm is extended and raised, palm UPWARD, whereas the Nazis extend the arm practically *straight to the front* (the finger tips being about even with the eyes), *palm* DOWNWARD, and the Fascists do the same except they raise the arm slightly higher." James A. Moss, The Flag of the United States: Its History and Symbolism (1914) 108.

[4] They have offered in lieu of participating in the flag salute ceremony "periodically and publicly" to give the following pledge:

"I have pledged my unqualified allegiance and devotion to Jehovah, the Almighty God, and to His Kingdom, for which Jesus commands all Christians to pray.

"I respect the flag of the United States and acknowledge it as a symbol of freedom and justice to all.

"I pledge allegiance and obedience to all the laws of the United States that are consistent with God's law, as set forth in the Bible."

[5] § 1851(1), West Virginia Code (1941 Supp.):

"If a child be dismissed, suspended, or expelled from school because of refusal of such child to meet the legal and lawful requirements of the school and the established regulations of the county and/or state board of education, further admission of the child to school shall be refused until such requirements and regulations be complied with. Any such child shall be treated as being unlawfully absent from school during the time he refuses to comply with such requirements and regulations, and any person having legal or actual control of such child shall be liable to prosecution under the provisions of this article for the absence of such child from school."

[6] § 4904(4), West Virginia Code (1941 Supp.).

liable to prosecution,[7] and if convicted are subject to fine not exceeding $50 and jail term not exceeding thirty days.[8]

Appellees, citizens of the United States and of West Virginia, brought suit in the United States District Court for themselves and others similarly situated asking its injunction to restrain enforcement of these laws and regulations against Jehovah's Witnesses. The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them." They consider that the flag is a "image" within this command. For this reason they refuse to salute it.

Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency.

The Board of Education moved to dismiss the complaint setting forth these facts and alleging that the law and regulations are an unconstitutional denial of religious freedom, and of freedom of speech, and are invalid under the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Federal Constitution. The cause was submitted on the pleadings to a District Court of three judges. It restrained enforcement as to the plaintiffs and those of that class. The Board of Education brought the case here by direct appeal.[9]

This case calls upon us to reconsider a precedent decision, as the Court throughout its history often has been required to do.[10] Before turning to the *Gobitis* case, however, it is desirable to notice certain characteristics by which this controversy is distinguished.

appellees

The freedom asserted by these ~~respondents~~ does not bring them into collision with rights asserted by any other individual. It is

[7] See Note 5, *supra*.

[8] §§ 1847, 1851, West Virginia Code (1941 Supp.).

[9] § 237 of the Judicial Code, 28 U. S. C. § 380.

[10] See authorities cited in Helvering v. Griffiths, (No. 467, decided March 1, 1943) p. 21, note 52.

such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

As the present CHIEF JUSTICE said in dissent in the *Gobitis* case, the State may "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country." 310 U. S. at 604. Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected[11] route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan.[12] This issue is not prejudiced by the Court's previous holding that where a State

[11] See the nation-wide survey of the study of American history conducted by the New York Times, the results of which are published in the issue of June 21, 1942, and are there summarized on p. 1, col. 1, as follows:

"82 per cent of the institutions of higher learning in the United States do not require the study of United States history for the undergraduate degree. Eighteen per cent of the colleges and universities require such history courses before a degree is awarded. It was found that many students complete their four years in college without taking any history courses dealing with this country.

"Seventy-two per cent of the colleges and universities do not require United States history for admission, while 28 per cent require it. As a result, the survey revealed, many students go through high school, college and then to the professional or graduate institution without having explored courses in the history of their country.

"Less than 10 per cent of the total undergraduate body was enrolled in United States history classes during the Spring semester just ended. Only 8 per cent of the freshman class took courses in United States history, although 20 per cent was enrolled in European or world history courses."

[12] The Resolution of the Board of Education did not adopt the flag salute because it was claimed to have educational value. It seems to have been concerned with promotion of national unity (see footnote 2), which justification is considered later in this opinion. No information as to its educational

without compelling attendance, extends college facilities to pupils who voluntarily enroll, it may prescribe military training as part of the course without offense to the Constitution. It was held that those who take advantage of its opportunities may not on ground of conscience refuse compliance with such conditions. *Hamilton* v. *Regents*, 293 U. S. 245. In the present case attendance is not optional. That case is also to be distinguished from the present one because, independently of college privileges or requirements, the State has power to raise militia and impose the duties of service therein upon its citizens.

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

Over a decade ago Chief Justice Hughes led this Court in holding that the display of a red flag as a symbol of opposition by peaceful and legal means to organized government was protected by the free speech guaranties of the Constitution. *Stromberg* v. *California*, 283 U. S. 359. Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to

aspect is called to our attention except Olander, Children's Knowledge of the Flag Salute, 35 Journal of Educational Research, 300, 305, which sets forth a "study of the ability of a large and representative number of children to remember and state the meaning of the flag salute which they recited each day in school. His conclusion was that it revealed "a rather pathetic picture of our attempts to teach children not only the words but the meaning of our Flag Salute".

this form of communication when coerced is an old one, well known to the framers of the Bill of Rights.[13]

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning. It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. Any credo of nationalism is likely to include what some disapprove or to omit what others think essential, and to give off different overtones as it takes on different accents or interpretations.[14] If official power exists to coerce acceptance of any patriotic creed, what it shall contain

[13] Early Christians were frequently persecuted for their refusal to participate in ceremonies before the statue of the emperor or other symbol of imperial authority. The story of William Tell's sentence to shoot an apple off his son's head for refusal to salute a bailiff's hat is an ancient one. 21 Encyclopedia Britannica (14th ed.) 911-912. The Quakers, William Penn included, suffered punishment rather than uncover their heads in deference to any civil authority. Braithwaite, The Beginnings of Quakerism (1912) 209, 229-230, 232-233, 447, 451; Fox, Quakers Courageous (1941) 113.

[14] For example: Use of "Republic," if rendered to distinguish our government from a "democracy," or the words "one Nation," if intended to distinguish it from a "federation," open up old and bitter controversies in our political history; "liberty and justice for all," if it must be accepted as descriptive of the present order rather than an ideal, might to some seem an overstatement.

cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one, presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

appellees'

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies ~~respondents~~ appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual.[15] It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

The *Gobitis* decision, however, *assumed*, as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule.[16] The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political

[15] Cushman, Constitutional Law in 1939-40, 35 American Political Science Review 256, 271, observes: "All of the eloquence by which the majority extol the ceremony of flag saluting as a free expression of patriotism turns sour when used to describe the brutal compulsion which requires a sensitive and conscientious child to stultify himself in public." For further criticism of the opinion in the *Gobitis* case by persons who do not share the faith of the Witnesses see: Powell, Conscience and the Constitution, in Democracy and National Unity (University of Chicago Press, 1941) 1; Wilkinson, Some Aspects of the Constitutional Guarantees of Civil Liberty, 11 Fordham Law Review 50; Fennell, The "Reconstructed Court" and Religious Freedom: The Gobitis Case in Retrospect, 19 New York University Law Quarterly Review 31; Green, Liberty under the Fourteenth Amendment, 27 Washington University Law Quarterly 497; 9 International Juridical Association Bulletin 1; 39 Michigan Law Review 149; 15 St. John's Law Review 95.

[16] The opinion says "That the flag salute is an allowable portion of a school program *for those who do not invoke conscientious scruples* is *surely not debatable*. But for us to insist that, *though the ceremony may be required, exceptional immunity must be given to dissidents*, is to maintain that there is no basis for a legislative judgment that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise." [Italics ours.] 310 U. S. at 599-600. And elsewhere the

attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power and, against this broader definition of issues in this case, re-examine specific grounds assigned for the *Gobitis* decision.

1. It was said that the flag-salute controversy confronted the Court with "the problem which Lincoln cast in memorable dilemma: 'Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?'" and that the answer must be in favor of strength. *Minersville School District* v. *Gobitis*, *supra*, at 596.

We think these issues may be examined free of pressure or restraint growing out of such considerations.

It may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the state to expel a handful of children from school. Such oversimplification, so handy in political debate, often lacks the precision necessary to postulates of judicial reasoning. If validly applied to this problem, the utterance cited would resolve every issue of power in favor of those in authority and would require us to override every liberty thought to weaken or delay execution of their policies.

Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

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question under consideration was stated, "When does the constitutional guarantee *compel exemption* from doing what society thinks necessary for the protection of some great common end, or from a penalty for conduct which appears dangerous to the general good?" [Italics ours.] *Id.* at 593. And again, ". . . whether school children, like the Gobitis children, must be *excused from conduct required of all the other children* in the promotion of national cohesion. . . ." [Italics ours.] *Id.* at 595.

The subject now before us exemplifies this principle. Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction. If it is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system. Observance of the limitations of the Constitution will not weaken government in the field appropriate for its exercise.

2. It was also considered in the *Gobitis* case that functions of educational officers in states, counties and school districts were such that to interfere with their authority "would in effect make us the school board for the country." *Id.* at 598.

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Such Boards are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account. The action of Congress in making flag observance voluntary[17] and respecting the conscience of the objector in a matter so vital as raising the Army[18] contrasts sharply with these local regulations in matters relatively trivial to the welfare of the nation. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution.

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[17] § 7 of House Joint Resolution 359, approved December 22, 1942, 56 Stat. 1074, 36 U. S. C. (1942 Supp.) § 172, prescribes no penalties for nonconformity but provides:

"That the pledge of allegiance to the flag, 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all', be rendered by standing with the right hand over the heart. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress . . . ."

[18] § 5 (a) of the Selective Training and Service Act of 1940, 50 U. S. C. (App.) § 305 (g).

3. The *Gobitis* opinion reasoned that this is a field "where courts possess no marked and certainly no controlling competence," that it is committed to the legislatures as well as the courts to guard cherished liberties and that it is constitutionally appropriate to "fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer the contest to the judicial arena," since all the "effective means of inducing political changes are left free." *Id.* at 597-598, 600.

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.

Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. True, the task of translating the majestic generalities of the Bill of Rights,

conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

4. Lastly, and this is the very heart of the *Gobitis* opinion, it reasons that "National unity is the basis of national security," that the authorities have "the right to select appropriate means for its attainment," and hence reaches the conclusion that such compulsory measures toward "national unity" are constitutional. *Id.* at 595. Upon the verity of this assumption depends our answer in this case.

National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division

of our pepole could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith

therein. If there are any circumstances which permit an exception, they do not now occur to us.[19]

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The decision of this Court in *Minersville School District* v. *Gobitis* and the holdings of those few *per curiam* decisions which preceded and foreshadowed it are overruled, and the judgment enjoining enforcement of the West Virginia Regulation is

Affirmed.

Mr. Justice ROBERTS and Mr. Justice REED adhere to the views expressed by the Court in *Minersville School District* v. *Gobitis*, 310 U. S. 586, and are of the opinion that the judgment below should be reversed.

Mr. Justice BLACK and Mr. Justice DOUGLAS, concurring.

We are substantially in agreement with the opinion just read, but since we originally joined with the Court in the *Gobitis* case, it is appropriate that we make a brief statement of reasons for our change of view.

Reluctance to make the Federal Constitution a rigid bar against state regulation of conduct thought inimical to the public welfare was the controlling influence which moved us to consent to the *Gobitis* decision. Long reflection convinced us that although the principle is sound, its application in the particular case was wrong. *Jones* v. *Opelika*, 316 U. S. 584, 623. We believe that the statute before us fails to accord full scope to the freedom of religion secured to the appellees by the First and Fourteenth Amendments.

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[19] The Nation may raise armies and compel citizens to give military service. Selective Draft Law Cases, 245 U. S. 366. It follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life.

The statute requires the appellees to participate in a ceremony aimed at inculcating respect for the flag and for this country. The Jehovah's Witnesses, without any desire to show disrespect for either the flag or the country, interpret the Bible as commanding, at the risk of God's displeasure, that they not go through the form of a pledge of allegiance to any flag. The devoutness of their belief is evidenced by their willingness to suffer persecution and punishment, rather than make the pledge.

No well ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity. Decision as to the constitutionality of particular laws which strike at the substance of religious tenets and practices must be made by this Court. The duty is a solemn one, and in meeting it we cannot say that a failure, because of religious scruples, to assume a particular physical position and to repeat the words of a patriotic formula creates a grave danger to the nation. Such a statutory exaction is a form of test oath, and the test oath has always been abhorrent in the United States.

Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men.

Neither our domestic tranquillity in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation. If, as we think, their fears are groundless, time and reason are the proper antidotes for their errors. The ceremonial, when enforced against conscientious objectors, more likely to defeat than to serve its high purpose, is a handy implement for disguised religious persecution. As such, it is inconsistent with our Constitution's plan and purpose.

Mr. Justice MURPHY, concurring.

I agree with the opinion of the Court and join in it.

The controversy challenges an order of the State Board of Education which requires teachers and pupils to participate in the prescribed salute to the flag. For refusal to conform with the requirement the State law prescribes expulsion. The offender is required by law to be treated as unlawfully absent from school and the parent or guardian is made liable to prosecution and punishment for such absence. Thus not only is the privilege of public education conditioned on compliance with the requirement, but non-compliance is virtually made unlawful. In effect compliance is compulsory and not optional. It is the claim of appellees that the regulation is invalid as a restriction on religious freedom and freedom of speech, secured to them against State infringement by the First and Fourteenth Amendments to the Constitution of the United States.

A reluctance to interfere with considered state action, the fact that the end sought is a desirable one, the emotion aroused by the flag as a symbol for which we have fought and are now fighting again, all of these are understandable. But there is before us the right of freedom to believe, freedom to worship one's Maker according to the dictates of one's conscience, a right which the Constitution specifically shelters. Reflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches.

The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society,—as in the case of compulsion to give evidence in court. Without wishing to disparage the purposes and intentions of those who hope to inculcate sentiments of loyalty and patriotism by requiring a declaration of allegiance as a feature of public education, or unduly belittle the benefits that may accrue therefrom, I am impelled to conclude that such a requirement is not essential to the maintenance of effective government and orderly society. To many it is deeply distasteful to join in a public chorus of affirmation of private belief. By some, including the members of this sect, it is apparently regarded as incompatible with a primary religious obli-

gation and therefore a restriction on religious freedom. Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship which, it is well to recall, was achieved in this country only after what Jefferson characterized as the "severest contests in which I have ever been engaged."[1]

I am unable to agree that the benefits that may accrue to society from the compulsory flag salute are sufficiently definite and tangible to justify the invasion of freedom and privacy that is entailed or to compensate for a restraint on the freedom of the individual to be vocal or silent according to his conscience or personal inclination. The trenchant words in the preamble to the Virginia Statute for Religious Freedom remain unanswerable: "... all attempts to influence [the mind] by temporal punishments, or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness. ..." Any spark of love for country which may be generated in a child or his associates by forcing him to make what is to him an empty gesture and recite words wrung from him contrary to his religious beliefs is overshadowed by the desirability of preserving freedom of conscience to the full. It is in that freedom and the example of persuasion, not in force and compulsion, that the real unity of America lies.

[1] See Jefferson, Autobiography, vol. 1, pp. 53-59.

SUPREME COURT OF THE UNITED STATES.

No. 591.—October Term, 1942.

The West Virginia State Board of Education, etc., et al., Appellants, vs. Walter Barnette, Paul Stull and Lucy McClure.	Appeal from the District Court of the United States for the Southern District of West Virginia.

[June 14, 1943.]

Mr. Justice Frankfurter, dissenting.

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review. Most unwillingly, therefore, I must differ from my

brethren with regard to legislation like this. I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen.

Not so long ago we were admonished that "the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government." *United States* v. *Butler*, 297 U. S. 1, 79 (dissent). We have been told that generalities do not decide concrete cases. But the intensity with which a general principle is held may determine a particular issue, and whether we put first things first may decide a specific controversy.

The admonition that judicial self-restraint alone limits arbitrary exercise of our authority is relevant every time we are asked to nullify legislation. The Constitution does not give us greater veto power when dealing with one phase of "liberty" than with another, or when dealing with grade school regulations than with college regulations that offend conscience, as was the case in *Hamilton* v. *Regents*, 293 U. S. 245. In neither situation is our function comparable to that of a legislature or are we free to act as though we were a super-legislature. Judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged. There is no warrant in the constitutional basis of this Court's authority for attributing different rôles to it depending upon the nature of the challenge to the legislation. Our power does not vary according to the particular provision of the Bill of Rights which is invoked. The right not to have property taken without just compensation has, so far as the scope of judicial power is concerned, the same constitutional dignity as the right to be protected against unreasonable searches and seizures, and the latter has no less claim than freedom of the press or freedom of speech or religious freedom. In no instance is this Court the primary protector of the particular liberty that is invoked. This Court has recognized, what hardly could be denied, that all the provisions of the first ten Amendments are "specific" prohibitions, *U. S.* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4. But each specific Amendment, in so far as em-

braced within the Fourteenth Amendment, must be equally respected, and the function of this Court does not differ in passing on the constitutionality of legislation challenged under different Amendments.

When Mr. Justice Holmes, speaking for this Court, wrote that "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts", *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U. S. 267, 270, he went to the very essence of our constitutional system and the democratic conception of our society. He did not mean that for only some phases of civil government this Court was not to supplant legislatures and sit in judgment upon the right or wrong of a challenged measure. He was stating the comprehensive judicial duty and rôle of this Court in our constitutional scheme whenever legislation is sought to be nullified on any ground, namely, that responsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered.

The framers of the federal Constitution might have chosen to assign an active share in the process of legislation to this Court. They had before them the well-known example of New York's Council of Revision, which had been functioning since 1777. After stating that "laws inconsistent with the spirit of this constitution, or with the public good, may be hastily and unadvisedly passed", the state constitution made the judges of New York part of the legislative process by providing that "all bills which have passed the senate and assembly shall, before they become laws", be presented to a Council of which the judges constituted a majority, "for their revisal and consideration". Art III, New York Constitution of 1777. Judges exercised this legislative function in New York for nearly fifty years. See Art. I, § 12, New York Constitution of 1821. But the framers of the Constitution denied such legislative powers to the federal judiciary. They chose instead to insulate the judiciary from the legislative function. They did not grant to this Court supervision over legislation.

The reason why from the beginning even the narrow judicial authority to nullify legislation has been viewed with a jealous

eye is that it serves to prevent the full play of the democratic process. The fact that it may be an undemocratic aspect of our scheme of government does not call for its rejection or its disuse. But it is the best of reasons, as this Court has frequently recognized, for the greatest caution in its use.

The precise scope of the question before us defines the limits of the constitutional power that is in issue. The State of West Virginia requires all pupils to share in the salute to the flag as part of school training in citizenship. The present action is one to enjoin the enforcement of this requirement by those in school attendance. We have not before us any attempt by the State to punish disobedient children or visit penal consequences on their parents. All that is in question is the right of the State to compel participation in this exercise by those who choose to attend the public schools.

We are not reviewing merely the action of a local school board. The flag salute requirement in this case comes before us with the full authority of the State of West Virginia. We are in fact passing judgment on "the power of the State as a whole". *Rippey* v. *Texas*, 193 U. S. 504, 509; *Skiriotes* v. *Florida*, 313 U. S. 69, 79. Practically we are passing upon the political power of each of the forty-eight states. To suggest that we are here concerned with the heedless action of some village tyrants is to distort the augustness of the constitutional issue and the reach of the consequences of our decision.

Under our constitutional system the legislature is charged solely with civil concerns of society. If the avowed or intrinsic legislative purpose is either to promote or to discourage some religious community or creed, it is clearly within the constitutional restrictions imposed on legislatures and cannot stand. But it by no means follows that legislative power is wanting whenever a general non-discriminatory civil regulation in fact touches conscientious scruples or religious beliefs of an individual or a group. Regard for such scruples or beliefs undoubtedly presents one of the most reasonable claims for the exertion of legislative accommodation. It is, of course, beyond our power to rewrite the State's requirement, by providing exemptions for those who do not wish to participate in the flag salute or by making some other accommodations to meet their scruples. That wisdom might suggest the making of such accommodations and that school administration would not find it too difficult to make them and yet maintain the

Moreover, since the First amendment has been read into the Fourteenth, our problem is precisely the same as it would be if we had before us an Act of Congress for the District of Columbia.

ceremony for those not refusing to conform, is outside our province to suggest. Tact, respect, and generosity toward variant views will always commend themselves to those charged with the duties of legislation so as to achieve a maximum of good will and to require a minimum of unwilling submission to a general law. But the real question is, who is to make such accommodations, the courts or the legislature?

This is no dry, technical matter. It cuts deep into one's conception of the democratic process—it concerns no less the practical differences between the means for making these accommodations that are open to courts and to legislatures. A court can only strike down. It can only say "This or that law is void." It cannot modify or qualify, it cannot make exceptions to a general requirement. And it strikes down not merely for a day. At least the finding of unconstitutionality ought not to have ephemeral significance unless the Constitution is to be reduced to the fugitive importance of mere legislation. When we are dealing with the Constitution of the United States, and more particularly with the great safeguards of the Bill of Rights, we are dealing with principles of liberty and justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental"—something without which "a fair and enlightened system of justice would be impossible". *Palko* v. *Connecticut*, 302 U. S. 319, 325; *Hurtado* v. *California*, 110 U. S. 516, 530, 531. If the function of this Court is to be essentially no different from that of a legislature, if the considerations governing constitutional construction are to be substantially those that underlie legislation, then indeed judges should not have life tenure and they should be made directly responsible to the electorate.

Conscientious scruples, all would admit, cannot stand against every legislative compulsion to do positive acts in conflict with such scruples. We have been told that such compulsions override religious scruples only as to major concerns of the state. But the determination of what is major and what is minor itself raises questions of policy. For the way in which men equally guided by reason appraise importance goes to the very heart of policy. Judges should be very diffident in setting their judgment against that of a state in determining what is and what is not a major concern, what means are appropriate to proper ends, and what is the total social cost in striking the balance of imponderables.

There have been many but unsuccessful proposals in the last sixty years to amend the Constitution to that end. See Sen. Doc. No. 91, 75th Cong., 1st Sess., pp. 248-51.

What one can say with assurance is that the history out of which grew constitutional provisions for religious equality and the writings of the great exponents of religious freedom—Jefferson, Madison, John Adams, Benjamin Franklin—are totally wanting in justification for a claim by dissidents of exceptional immunity from civic measures of general applicability, measures not in fact disguised assaults upon such dissident views. The great leaders of the American Revolution were determined to remove political support from every religious establishment. They put on an equality the different religious sects—Episcopalians, Presbyterians, Catholics, Baptists, Methodists, Quakers, Huguenots—which, as dissenters, had been under the heel of the various orthodoxies that prevailed in different colonies. So far as the state was concerned, there was to be neither orthodoxy nor heterodoxy. And so Jefferson and those who followed him wrote guarantees of religious freedom into our constitutions. Religious minorities as well as religious majorities were to be equal in the eyes of the political state. But Jefferson and the others also knew that minorities may disrupt society. It never would have occurred to them to write into the Constitution the subordination of the general civil authority of the state to sectarian scruples.

The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma. Religious loyalties may be exercised without hindrance from the state, not the state may not exercise that which except by leave of religious loyalties is within the domain of temporal power. Otherwise each individual could set up his own censor against obedience to laws conscientiously deemed for the public good by those whose business it is to make laws.

The prohibition against any religious establishment by the government placed denominations on an equal footing—it assured freedom from support by the government to any mode of worship and the freedom of individuals to support any mode of worship. Any person may therefore believe or disbelieve what he pleases. He may practice what he will in his own house of worship or publicly within the limits of public order. But the lawmaking authority is not circumscribed by the variety of religious beliefs, otherwise the constitutional guarantee would be not a protection of the free exercise of religion but a denial of the exercise of legislation.

The essence of the religious freedom guaranteed by our Constitution is therefore this: no religion shall either receive the state's support or incur its hostility. Religion is outside the sphere of political government. This does not mean that all matters on which religious organizations or beliefs may pronounce are outside the sphere of government. Were this so, instead of the separation of church and state, there would be the subordination of the state on any matter deemed within the sovereignty of the religious conscience. Much that is the concern of temporal authority affects the spiritual interests of men. But it is not enough to strike down a non-discriminatory law that it may hurt or offend some dissident view. It would be too easy to cite numerous prohibitions and injunctions to which laws run counter if the variant interpretations of the Bible were made the tests of obedience to law. The validity of secular laws cannot be measured by their conformity to religious doctrines. It is only in a theocratic state that ecclesiastical doctrines measure legal right or wrong.

An act compelling profession of allegiance to a religion, no matter how subtly or tenuously promoted, is bad. But an act promoting good citizenship and national allegiance is within the domain of governmental authority and is therefore to be judged by the same considerations of power and of constitutionality as those involved in the many claims of immunity from civil obedience because of religious scruples.

That claims are pressed on behalf of sincere religious convictions does not of itself establish their constitutional validity. Nor does waving the banner of religious freedom relieve us from examining into the power we are asked to deny the states. Otherwise the doctrine of separation of church and state, so carefully in the history of this nation and for the liberty of our people would mean not the disestablishment of a state church but the establishment of all churches and of all religious groups.

The subjection of dissidents to the general requirement of saluting the flag, as a measure conducive to the training of children in good citizenship, is very far from being the first instance of exacting obedience to general laws that have offended deep religious scruples. Compulsory vaccination, see *Jacobson* v. *Massachusetts*, 197 U. S. 11, food inspection regulations, see *Shapiro* v. *Luke*, 30 F. 2d 971, the obligation to bear arms, see *Hamilton* v. *Regents*, 293 U. S. 245, 267, testimonial duties, see *Stansbury* v.

Marks, 2 Dall. 213, compulsory medical treatment, see *People* v. *Vogelgesang*, 221 N. Y. 290— these are but illustrations of conduct that has often been compelled in the enforcement of legislation of general applicability even though the religious consciences of particular individuals rebelled at the exaction.

Law is concerned with external behavior and not with the inner life of man. It rests in large measure upon compulsion. Socrates lives in history partly because he gave his life for the conviction that duty of obedience to secular law does not presuppose consent to its enactment or belief in its virtue. The consent upon which free government rests is the consent that comes from sharing in the process of making and unmaking laws. The state is not shut out from a domain because the individual conscience may deny the state's claim. The individual conscience may profess what faith it chooses. It may affirm and promote that faith—in the language of the Constitution, it may "exercise" it freely—but it cannot thereby restrict community action through political organs in matters of community concern, so long as the action is not asserted in a discriminatory way either openly or by stealth. One may have the right to practice one's religion and at the same time owe the duty of formal obedience to laws that run counter to one's beliefs. Compelling belief implies denial of opportunity to combat it and to assert dissident views. Such compulsion is one thing. Quite another matter is submission to conformity of action while denying its wisdom or virtue and with ample opportunity for seeking its change or abrogation.

In *Hamilton* v. *Regents*, 293 U. S. 245, this Court unanimously held that one attending a state-maintained university cannot refuse attendance on courses that offend his religious scruples. That decision is not overruled today, but is distinguished on the ground that attendance at the institution for higher education was voluntary and therefore a student could not refuse compliance with its conditions and yet take advantage of its opportunities. But West Virginia does not compel the attendance at its public schools of the children here concerned. West Virginia does not so compel, for it cannot. This Court denied the right of a state to require its children to attend public schools. *Pierce* v. *Society of Sisters*, 268 U. S. 510. As to its public schools, West Virginia imposes conditions which it deems necessary in the development of future citizens precisely as California deemed necessary the

requirements that offended the student's conscience in the *Hamilton* case. The need for higher education and the duty of the state to provide it as part of a public educational system, are part of the democratic faith of most of our states. The right to secure such education in institutions not maintained by public funds is unquestioned. But the practical opportunities for obtaining what is becoming in increasing measure the conventional equipment of American youth may be no less burdensome than that which parents are increasingly called upon to bear in sending their children to parochial schools because the education provided by public schools, though supported by their taxes, does not satisfy their ethical and educational necessities. I find it impossible, so far as constitutional power is concerned, to differentiate what was sanctioned in the *Hamilton* case from what is nullified in this case. And for me it still remains to be explained why the grounds of Mr. Justice Cardozo's opinion in *Hamilton* v. *Regents*, *supra*, are not sufficient to sustain the flag salute requirement. Such a requirement, like the requirement in the *Hamilton* case, "is not an interference by the state with the free exercise of religion when the liberties of the constitution are read in the light of a century and a half of history during days of peace and war." 293 U. S. 245, 266. The religious worshiper, "if his liberties were to be thus extended, might refuse to contribute taxes . . . in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government." *Id.*, at 268.

Parents have the privilege of choosing which schools they wish their children to attend. And the question here is whether the state may make certain requirements that seem to it desirable or important for the proper education of those future citizens who go to schools maintained by the states, or whether the pupils in those schools may be relieved from those requirements if they run counter to the consciences of their parents. Not only have parents the right to send children to schools of their own choosing but the state has no right to bring such schools "under a strict governmental control" or give "affirmative direction concerning the intimate and essential details of such schools, entrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum, and text-

books". *Farrington* v. *Tokushige*, 273 U. S. 284, 298. Why should not the state likewise have constitutional power to make reasonable provisions for the proper instruction of children in schools maintained by it?

When dealing with religious scruples we are dealing with an almost numberless variety of doctrines and beliefs entertained with equal sincerity by the particular groups for which they satisfy man's needs in his relation to the mysteries of the universe. There are in the United States more than 250 distinctive established religious denominations. In the state of Pennsylvania there are 120 of these, and in West Virginia as many as 65. But if religious scruples afford immunity from civic obedience to laws, they may be invoked by the religious beliefs of any individual even though he holds no membership in any sect or organized denomination. Certainly this Court cannot be called upon to determine what claims of conscience should be recognized and what should be rejected as satisfying the "religion" which the Constitution protects. That would indeed resurrect the very discriminatory treatment of religion which the Constitution sought forever to forbid. And so, when confronted with the task of considering the claims of immunity from obedience to a law dealing with civil affairs because of religious scruples, we cannot conceive religion more narrowly than in the terms in which Judge Augustus N. Hand recently characterized it:

"It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellowmen and to his universe. . . . [It] may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse." *United States* v. *Kauten*, 133 F. 2d 703, 708.

Consider the controversial issue of compulsory Bible-reading in public schools. The educational policies of the states are in great conflict over this, and the state courts are divided in their decisions on the issue whether the requirement of Bible-reading offends constitutional provisions dealing with religious freedom. The requirement of Bible-reading has been justified by various state courts as an appropriate means of inculcating ethical precepts and familiarizing pupils with the most lasting expression of great English literature. Is this Court to overthrow such variant state

educational policies by denying states the right to entertain such convictions in regard to their school systems, because of a belief that the King James version is in fact a sectarian text to which parents of the Catholic and Jewish faiths and of some Protestant persuasions may rightly object to having their children exposed? On the other hand the religious consciences of some parents may rebel at the absence of any Bible-reading in the schools. See *Washington ex rel. Chithero* v. *Shoemaker*, 284 U. S. 573. Or is this Court to enter the old controversy between science and religion by unduly defining the limits within which a state may experiment with its school curricula? The religious consciences of some parents may be offended by subjecting their children to the Biblical account of creation, while another state may offend parents by prohibiting a teaching of biology that contradicts such Biblical account. Compare *Scopes* v. *State*, 154 Tenn. 105. What of conscientious objections to what is devoutly felt by parents to be the poisoning of impressionable minds of children by chauvinistic teaching of history? This is very far from a fanciful suggestion for in the belief of many thoughtful people nationalism is the seed-bed of war.

There are other issues in the offing which admonish us of the difficulties and complexities that confront states in the duty of administering their local school systems. All citizens are taxed for the support of public schools although this Court has denied the right of a state to compel all children to go to such schools and has recognized the right of parents to send children to privately maintained schools. Parents who are dissatisfied with the public schools thus carry a double educational burden. Children who go to public school enjoy in many states derivative advantages such as free text books, free lunch, and free transportation in going to and from school. What of the claims for equality of treatment of those parents who, because of religious scruples, cannot send their children to public schools? What of the claim that if the right to send children to privately maintained schools is partly an exercise of religious conviction, to render effective this right it should be accompanied by equality of treatment by the state in supplying free textbooks, free lunch, and free transportation to children who go to private schools? What of the claim that such grants are offensive to the cardinal constitutional doctrine of separation of church and state?

These questions assume increasing importance in view of the steady growth of parochial schools both in number and in population. I am not borrowing trouble by adumbrating these issues nor am I parading horrible examples of the consequences of today's decision. I am aware that we must decide the case before us and not some other case. But that does not mean that a case is dissociated from the past and unrelated to the future. We must decide this case with due regard for what went before and no less regard for what may come after. Is it really a fair construction of such a fundamental concept as the right freely to exercise one's religion that a state cannot choose to require all children who attend public school to make the same gesture of allegience to the symbol of our national life because it may offend the conscience of some children, but that it may compel all children to attend public school to listen to the King James version although it may offend the consciences of their parents? And what of the larger issue of claiming immunity from obedience to a general civil regulation that has a reasonable relation to a public purpose within the general competence of the state? See *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535. Another member of the sect now before us insisted that in forbidding her two little girls, aged nine and twelve, to distribute pamphlets Oregon infringed her and their freedom of religion in that the children were engaged in "preaching the gospel of God's Kingdom". A procedural technicality led to the dismissal of the case, but the problem remains. *McSparran* v. *City of Portland*, No. 597, this Term.

These questions are not lightly stirred. They touch the most delicate issues and their solution challenges the best wisdom of political and religious statesmen. But it presents awful possibilities to try to encase the solution of these problems within the rigid prohibitions of unconstitutionality.

We are told that a flag salute is a doubtful substitute for adequate understanding of our institutions. The states that require such a school exercise do not have to justify it as the only means for promoting good citizenship in children, but merely as one of diverse means for accomplishing a worthy end. We may deem it a foolish measure, but the point is that this Court is not the organ of government to resolve doubts as to whether it will fulfill its purpose. Only if there be no doubt that any reasonable mind could entertain can we deny to the states the right to resolve doubts their way and not ours

that which to the majority may seem essential for the welfare of the state may offend the consciences of a minority. But, so long as no inroads are made upon the actual exercise of religion by the minority, to deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of a minority, really means that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority.

We are told that symbolism is a dramatic but primitive way of communicating ideas. Symbolism is inescapable. Even the most sophisticated live by symbols. But it is not for this Court to make psychological judgments as to the effectiveness of a particular symbol in inculcating concededly indispensable feelings, particularly if the State happens to see fit to utilize the symbol that represents our heritage and our hopes. And surely only flippancy could be responsible for the suggestion that constitutional validity of a requirement to salute our flag implies equal validity of a requirement to salute a dictator. The significance of a symbol lies in what it represents. To reject the swastika does not imply rejection of the Cross. And so it bears repetition to say that it mocks reason and denies our whole history to find in the allowance of a requirement to salute our flag on fitting occasions the seeds of sanction for obeisance to a leader. To deny the power to employ educational symbols is to say that the state's educational system may not stimulate the imagination because this may lead to unwise stimulation.

The right of West Virginia to utilize the flag salute as part of its educational process is denied because, so it is argued, it cannot be justified as a means of meeting a "clear and present danger" to national unity. In passing it deserves to be noted that the four cases which unanimously sustained the power of states to utilize such an educational measure arose and were all decided before the present World War. But to measure the state's power to make such regulations as are here resisted by the imminence of national danger is wholly to misconceive the origin and purpose of the concept of "clear and present danger". To apply such a test is for the Court to assume, however unwittingly, a legislative responsibility that does not belong to it. To talk about "clear and present danger" as the touchstone of allowable educational policy by the states whenever school curricula may impinge upon the boundaries of individual conscience, is to take a felicitous phrase out of the context of the particular situation where

arose and for which it was adapted. Mr. Justice Holmes used the phrase "clear and present danger" in a case involving mere speech as a means by which alone to accomplish sedition in time of war. By that phrase he meant merely to indicate that, in view of the protection given to utterance by the First Amendment, in order that mere utterance may not be proscribed, "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck* v. *United States*, 249 U. S. 47, 52. The "substantive evils" about which he was speaking were inducement of insubordination in the military and naval forces of the United States and obstruction of enlistment while the country was at war. He was not enunciating a formal rule that there can be no restriction upon speech and, still less, no compulsion where conscience balks, unless imminent danger would thereby be wrought "to our institutions or our government".

The flag salute exercise has no kinship whatever to the oath tests so odious in history. For the oath test was one of the instruments for suppressing heretical beliefs. Saluting the flag suppresses no belief nor curbs it. Children and their parents may believe what they please, avow their belief and practice it. It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute. All channels of affirmative free expression are open to both children and parents. Had we before us any act of the state putting the slightest curbs upon such free expression, I should not lag behind any member of this Court in striking down such an invasion of the right to freedom of thought and freedom of speech protected by the Constitution.

I am fortified in my view of this case by the history of the flag salute controversy in this Court. Five times has the precise question now before us been adjudicated. Four times the Court unanimously found that the requirement of such a school exercise was not beyond the powers of the states. Indeed in the first three cases to come before the Court the constitutional claim now sustained was deemed so clearly unmeritorious that this Court dismissed the appeals for want of a substantial federal question. *Leoles* v. *Landers*, 302 U. S. 656; *Hering* v. *State Board of Edu-*

cation, 303 U. S. 624; *Gabrielli* v. *Knickerbocker*, 306 U. S. 621. In the fourth case the judgment of the district court upholding the state law was summarily affirmed on the authority of the earlier cases. *Johnson* v. *Deerfield*, 306 U. S. 621. The fifth case, *Minersville District* v. *Gobitis*, 310 U. S. 586, was brought here because the decision of the Circuit Court of Appeals for the Third Circuit ran counter to our rulings. They were reaffirmed after full consideration, with one Justice dissenting.

What may be even more significant than this uniform recognition of state authority is the fact that every Justice—thirteen in all—who has hitherto participated in judging this matter has at one or more times found no constitutional infirmity in what is now condemned. Only the two Justices sitting for the first time on this matter have not heretofore found this legislation inoffensive to the "liberty" guaranteed by the Constitution. And among the Justices who sustained this measure were outstanding judicial leaders in the zealous enforcement of constitutional safeguards of civil liberties—men like Chief Justice Hughes, Mr. Justice Brandeis, and Mr. Justice Cardozo, to mention only those no longer on the Court.

three of Stone's witness cases (except for minor deviations subsequently retracted)

One's conception of the Constitution cannot be severed from one's conception of a judge's function in applying it. The Court has no reason for existence if it merely reflects the pressures of the day. Our system is built on the faith that men set apart for this special function, freed from the influences of immediacy and from the deflections of worldly ambition, will become able to take a view of longer range than the period of responsibility entrusted to Congress and legislatures. We are dealing with matters as to which legislators and voters have conflicting views. Are we as judges to impose our strong convictions on where wisdom lies? That which three years ago had seemed to five successive Courts to be within permissible areas of legislation is now outlawed by the deciding shift of opinion of two Justices. What reason is there to believe that they or their successors may not have another view a few years hence? Is that which was deemed to be of so fundamental a nature as to be written into the Constitution to endure for all times to be the sport of shifting winds of doctrine? Of course, judicial opinions, even as to questions of constitutionality, are not immutable. As has been true in the past, the Court will from time to time reverse its position. But I believe that never before has this Court ~~changed its views~~ so as to restrict the powers of democratic government. Always heretofore, it has

overruled decisions -

withdrawn narrow views of legislative authority so as to authorize what formerly it had denied.

In view of this history it must be plain that what thirteen Justices found to be within the constitutional authority of a state legislators can not be deemed unreasonable in enacting. Therefore, in denying to the states what heretofore has received such impressive judicial sanction, some other tests of unconstitutionality must surely be guiding the Court than the absence of a rational justification for the legislation. But I know of no other test which this Court is authorized to apply in nullifying legislation.

In the past this Court has from time to time set its views of policy against that embodied in legislation by finding laws in conflict with what was called the "spirit of the Constitution". Such undefined destructive power was not conferred on this Court by the Constitution. Before a duly enacted law can be judicially nullified, it must be forbidden by some explicit restriction upon political authority in the Constitution. Equally inadmissible is the claim to strike down legislation because to us as individuals it seems opposed to the "plan and purpose" of the Constitution. That is too tempting a basis for finding in one's personal views the purposes of the Founders.

The uncontrollable power wielded by this Court brings it very close to the most sensitive areas of public affairs. As appeal from legislation to adjudication becomes more frequent, and its consequences more far-reaching, judicial self-restraint becomes more and not less important, lest we unwarrantably enter social and political domains wholly outside our concern. I think I appreciate fully the objections to the law before us. But to deny that it presents a question upon which men might reasonably differ appears to me to be intolerance. And since men may so reasonably differ, I deem it beyond my constitutional power to assert my view of the wisdom of this law against the view of the State of West Virginia.

Jefferson's opposition to judicial review has not been accepted by history, but it still serves as an admonition against confusion between judicial and political functions. As a rule of judicial self-restraint, it is still as valid as Lincoln's admonition. For those who pass laws not only are under duty to pass laws. They are also under duty to observe the Constitution. And even though legislation relates to civil liberties, our duty of deference to those

who have the responsibility for making the laws is no less relevant or less exacting. And this is so especially when we consider the accidental contingencies by which one man may determine constitutionality and thereby confine the political power of the Congress of the United States and the legislatures of forty-eight states. The attitude of judicial humility which these considerations enjoin is not an abdication of the judicial function. It is a due observance of its limits. Moreover, it is to be borne in mind that in a question like this we are not passing on the proper distribution of political power as between the states and the central government. We are not discharging the basic function of this Court as the mediator of powers within the federal system. To strike down a law like this is to deny a power to all government.

The whole Court is conscious that this case reaches ultimate questions of judicial power and its relation to our scheme of government. It is appropriate, therefore, to recall an utterance as wise as any that I know in analyzing what is really involved when the theory of this Court's function is put to the test of practice. The analysis is that of James Bradley Thayer:

"... there has developed a vast and growing increase of judicial interference with legislation. This is a very different state of things from what our fathers contemplated, a century and more ago, in framing the new system. Seldom, indeed, as they imagined, under our system, would this great, novel, tremendous power of the courts be exerted,—would this sacred ark of the covenant be taken from within the veil. Marshall himself expressed truly one aspect of the matter, when he said in one of the later years of his life: 'No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of legislative acts. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other grounds, a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed.' And again, a little earlier than this, he laid down the one true rule of duty for the courts. When he went to Philadelphia at the end of September, in 1831, on that pathetic errand of which I have spoken, in answering a cordial tribute from the bar of that city he remarked that if he might be permitted to claim for himself and his associates any part of the kind things they had said, it would be this, that they had 'never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required.'

"That is the safe two-fold rule: nor is the first part of it any whit less important than the second; nay, more; to-day it is the part which most requires to be emphasized. For just here comes in

onsideration of very great weight. Great and, indeed, inestimable as are the advantages in a popular government of this conservative influence,—the power of the judiciary to disregard unconstitutional legislation,—it should be remembered that the exercise of it, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors. If the decision in Mann v. Illinois and the 'Granger Cases,' twenty-five years ago, and in the 'Legal Tender Cases,' nearly thirty years ago, had been different; and the legislation there in question, thought by many to be unconstitutional and by many more to be ill-advised, had been set aside, we should have been saved some trouble and some harm. But I venture to think that the good which came to the country and its people from the vigorous thinking that had to be done in the political debates that followed, from the infiltration through every part of the population of sound ideas and sentiments, from the rousing into activity of opposite elements, the enlargement of ideas, the strengthening of moral fibre, and the growth of political experience that came out of it all,—that all this far more than outweighed any evil which ever flowed from the refusal of the court to interfere with the work of the legislature.

"The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that.

"What can be done? It is the courts that can do most to cure the evil; and the opportunity is a very great one. Let them resolutely adhere to first principles. Let them consider how narrow is the function which the constitutions have conferred on them, the office merely of deciding litigated cases; how large, therefore, is the duty intrusted to others, and above all to the legislature. It is that body which is charged, primarily, with the duty of judging of the constitutionality of its work. The constitutions generally give them no authority to call upon a court for advice; they must decide for themselves, and the courts may never be able to say a word. Such a body, charged, in every State, with almost all the legislative power of the people, is entitled to the most entire and real respect; is entitled, as among all rationally permissible opinions as to what the constitution allows, to its own choice. Courts, as has often been said, are not to think of the legislators, but of the legislature, the great, continuous body itself, abstracted from all the transitory individuals who may happen to hold its power. It is this majestic representative of the people whose action is in question, a co-ordinate department of the government, charged with the greatest functions and invested, in contemplation

of law with whatsoever wisdom, virtue, and knowledge the exercise of such functions requires.

"To set aside the acts of such a body, representing in its own field, which is the very highest of all, the ultimate sovereign, should be a solemn, unusual, and painful act. Something is wrong when it can ever be other than that. And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation. The judiciary, to-day, in dealing with the acts of their coordinate legislators, owe to the country no greater or clearer duty than that of keeping their hands off these acts wherever it is possible to do it. For that course—the true course of judicial duty always—will powerfully help to bring the people and their representatives to a sense of their own responsibility. There will still remain to the judiciary an ample field for the determinations of this remarkable jurisdiction, of which our American law has so much reason to be proud, a jurisdiction which has had some of its chief illustrations and its greatest triumphs, as in Marshall's time, so in ours, while the courts were refusing to exercise it." J. B. Thayer, John Marshall (1901) 104-10.

~~It is self-delusive to believe that~~ the liberal spirit ~~can~~ be enforced by judicial invalidation of illiberal legislation. Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focussing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.

Because patriotism can not be enforced by the flag salute. But neither can